

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIKE YOUSEFI,

Defendant and Appellant.

B201982

(Los Angeles County
Super. Ct. No. LA053050)

APPEAL from the judgment of the Superior Court of Los Angeles County.

Richard H. Kirschner, Judge. Affirmed.

Sara H. Ruddy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec, and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Mike Yousefi appeals from the judgment entered after a jury convicted him of forgery and grand theft. We hold that evidence he was trying to pay back the bank where he passed the bad checks was either properly admitted at trial or, alternatively, was not prejudicial, and therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Between April 24 and 26, 2006, four forged checks totaling just over \$16,000 were deposited to Mike Yousefi's Wells Fargo Bank checking account. From April 24 through April 27, numerous withdrawals or debit card purchases totaling more than \$12,000 were made against Yousefi's account. When the four forged checks were returned unpaid, a Wells Fargo fraud investigator looked into the matter and referred it to the Los Angeles Police Department.¹

Los Angeles Police Department Detective William Cooper questioned Yousefi. Cooper showed Yousefi 13 bank surveillance photos from the deposits and withdrawals, and, according to Cooper, Yousefi said he was depicted in 11 of them. However, Yousefi denied ever seeing or depositing the four forged checks. Yousefi told Cooper he gave his ATM/debit card to a friend named Behzad Tehrani, but never got it back. He admitted to personally withdrawing \$12,000 from his account between April 24 and 26, but said all but \$500 went to Tehrani.

Yousefi was charged with grand theft (Pen. Code, § 487, subd. (a)) and forgery (Pen. Code, § 470, subd. (d)).² The evidence against Yousefi consisted primarily of: (1) bank records, which showed the date, time, and place of various transactions on Yousefi's account, including withdrawals, deposits, debit card purchases, and account inquiries; (2) records showing that Yousefi's driver's license and ATM card were presented as identification at some of the in-bank transactions, while the ATM card was

¹ We will sometimes refer to Wells Fargo as the bank.

² The original information also included a count of forgery under Penal Code section 470, subdivision (a), but that count was dismissed before trial.

used to conduct the various electronic deposits, withdrawals, purchases, and account inquiries; (3) the ATM and over-the-counter transaction surveillance photos; and (4) proof that the four checks were forged.³

Yousefi testified and blamed Tehrani for depositing bad checks without his knowledge. According to Yousefi, the two met in the early 1990's when Tehrani sold his car to Yousefi. About a year later, Yousefi sold a car to Tehrani. They became friends but lost touch when Yousefi returned to his native Iran. Yousefi eventually returned to the United States and resumed his friendship with Tehrani in 2006 when they met by chance at a coffee shop. Tehrani was living in Las Vegas at the time, but returned to California because he was going through a divorce. Tehrani told Yousefi he had money from the sale of his father's home in Iran and wanted to bring the proceeds into the United States in a way that would prevent it from being considered community property for purposes of his divorce. At Tehrani's request, Yousefi agreed to let Tehrani wire money into Yousefi's Wells Fargo account. In order to accomplish this, he gave Tehrani the account number, his password, and his ATM card. Yousefi made withdrawals of \$12,000 from his account and gave it to Tehrani, but had no knowledge that the source of those funds came from forged checks deposited by Tehrani. According to Yousefi, he first learned there was a problem when Wells Fargo contacted him about his account being overdrawn. Yousefi phoned Tehrani several times, but Tehrani said he was in New York and would call when he returned to California. Eventually, Tehrani's phone number was disconnected and Yousefi lost track of him. Tehrani did not testify.

The bank's fraud investigator testified that only one ATM card had been issued to Yousefi, and that loaning the card and giving the account password to someone else would have violated Yousefi's contract with the bank.

Surveillance photos of only two of the four forged check deposits were in evidence. Yousefi testified that those photos -- one from an Encino ATM deposit of

³ The fact that the checks were forged is undisputed, but Yousefi contends it was not done by him.

\$4,300 at 12:58 p.m. on April 24 and the other from an over-the-counter deposit of \$3,900 at 2:41 p.m. on April 25 at a mid-Wilshire branch -- depicted neither him nor Tehrani. The other two deposits were of \$4,400 at an Encino ATM at 3:51 p.m. on April 24 and of \$3,540 at a West Pico branch at 2:54 p.m. on April 26. Yousefi admitted that several photographs of four over-the-counter withdrawals between April 26 and April 27 were of him. Those four withdrawals occurred as follows: (1) at 12:25 p.m. on April 26 for \$6,000 from the Wells Fargo Van Nuys branch; (2) at 2:57 p.m. on April 26 for \$1,700 from a Wells Fargo branch in Inglewood; (3) at 4:46 p.m. on April 26 for \$60 from the Inglewood branch; and (4) at 9:50 a.m. on April 27 for \$6,800 from the Van Nuys branch. When Detective Cooper questioned Yousefi and showed him the surveillance photos, the photos were not numbered and were presented in a confusing manner. Yousefi testified that photos from the April 25 deposit were so clearly of someone else that even a child could tell the difference.⁴

Yousefi once phoned Detective Cooper and said a friend told him Tehrani was at the Hollywood Park race track. Cooper told Yousefi to get a driver's license or a license plate number so Cooper could track him down. However, according to Cooper, Yousefi never got back to him with any information, and Cooper was never able to identify Tehrani.

Yousefi also testified on direct examination that he had so far paid back \$5,000 to Wells Fargo. This testimony was introduced preemptively after the trial court ruled it was admissible by cross-examination in the event Yousefi testified. The propriety of that ruling is the primary issue on appeal.

⁴ We have examined the photos and compared them with Yousefi's driver's license photo, all of which were in evidence. We agree with Yousefi that two different people are shown in the various deposit surveillance photos. The withdrawal surveillance photos are so blurry that if Yousefi had not admitted they were of him, it would be impossible to identify the person shown.

DISCUSSION

1. Admitting the Restitution Evidence Was Not Error

Early in the trial, defense counsel asked the trial court to rule that evidence of Yousefi's \$5,000 payment to the bank was inadmissible. Defense counsel acknowledged there was a dearth of case authority on the subject and the trial court said it would not allow the evidence because, much like civil settlement offers, it implied responsibility. When the prosecution raised the issue again midtrial, the court repeated its earlier ruling.

Later that day, however, the court changed its mind and said the evidence would not be allowed during the prosecution's case-in-chief, but would be permitted on cross-examination if Yousefi testified. As an alternative, Yousefi could bring it out during his own direct examination, the court said. In an apparent reference to Evidence Code section 1152,⁵ the trial court said evidence of settlement offers is ordinarily not allowed and the court would not allow such evidence as part of the prosecution's case because there could well be innocent explanations for making restitution. However, when a defendant testifies, the issue can be explored because the defendant will then have a chance to explain his decision. Defense counsel argued that the evidence was not very probative because Yousefi was responsible for what happened to his checking account and, should the bank ever sue, would be civilly liable. The trial court disagreed, and Yousefi testified on direct examination that after Wells Fargo closed his account, it sent him letters asking him to pay back the missing funds. Yousefi said that so far he had paid back \$5,000 to Wells Fargo. Yousefi did so "[b]ecause they have entered my name into the check system, and that has ruined my credit." Asked what he hoped to accomplish once he paid Wells Fargo back in full, Yousefi said, "[s]o that I can reestablish having accounts or work just like before."

Yousefi contends the evidence violated section 1152, which provides:

"(a) Evidence that a person has, in compromise or from humanitarian motives, furnished

⁵ All further undesignated section references are to the Evidence Code.

or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.” Respondent contends section 1152 does not apply to criminal prosecutions. (See *People v. Muniz* (1989) 213 Cal.App.3d 1508, 1515-1516.) Yousefi contends *Muniz* was wrongly decided and that some federal court decisions construing the federal statute upon which section 1152 was modeled (Fed. Rules Evid., rule 408) have held that evidence concerning the compromise of a related civil dispute is inadmissible in a criminal trial. (See *United States v. Arias* (11th Cir. 2005) 431 F.3d 1327, 1336.) We need not reach this issue. Instead, we affirm on an alternate ground raised by respondent: that the payments made by Yousefi fall outside the scope of section 1152.⁶

Yousefi contends that his payments to Wells Fargo qualified under section 1152 either because: (1) they were by themselves an offer to compromise, which would result in relinquishing his right to contest any civil liability for the bank’s losses; or (2) because they were made out of humanitarian motives to make the bank whole for the losses caused by his misplaced faith in Tehrani. We disagree.

The term “ ‘compromise’ connotes mutual concessions; it reflects the settling parties’ temporal resolution of the risks of suit as between them.” (*Wade v. 20th Century Ins. Co.* (1988) 206 Cal.App.3d 32, 38.) “The gist of a compromise of a disputed controversy is the mutual intention of the disputants that they are resolving their differences.” (*Putman v. Cameron* (1954) 129 Cal.App.2d 89, 94.) When a party tenders payment in full of the amount claimed as damages by another, no offer of compromise is made because there were no negotiations to settle or conflicting claims to adjust. (*Kelly*

⁶ Respondent contends Yousefi waived the section 1152 issue because defense counsel did not make a specific objection on that ground. (§ 353.) We disagree. The trial court’s reference to the general inadmissibility of civil settlement offers shows it clearly had section 1152 in mind when discussing the matter, leading us to hold the issue was not waived. (*People v. Samuels* (2005) 36 Cal.4th 96, 120.)

v. Steinberg (1957) 148 Cal.App.2d 211, 218-219 (*Kelly*) [interpreting former Code Civ. Proc., § 2078, the predecessor of section 1152].)

When distilled, Yousefi testified that he had so far paid back to the bank \$5,000 after receiving letters from Wells Fargo about its \$12,000 loss. He did so because his accounts had been closed and his credit rating ruined, and because he hoped to remedy that situation. There is no evidence that he responded to Wells Fargo except by sending it some of the money it was owed with the intent to eventually pay back all that Wells Fargo claimed. Yousefi did not testify that he and the bank settled the bank's \$12,000 claim for \$5,000, or for that matter, for any amount. Therefore the only difference between Yousefi and the defendant in *Kelly, supra*, 148 Cal.App.2d 211, is that Yousefi did not respond to a payment demand with payment in full, but made a partial payment with the intention to make good on the entire amount claimed by Wells Fargo. There is no evidence that when he did so, he ever informed Wells Fargo that he was tendering payment in settlement of all claims or that an express condition of accepting his eventual payment of the amount claimed would constitute full payment of Wells Fargo's claims. As such, his tender of the partial payments was not an offer of compromise, despite any uncommunicated intentions to the contrary he might have had. (*In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1059.)

As for furnishing the money to Wells Fargo out of humanitarian motives, even if repayment to such an institution could, under some circumstances, be considered humanitarian, such circumstances cannot be found in Yousefi's testimony. Yousefi did not contend he was trying to make amends or make Wells Fargo whole. Instead, Yousefi said he was trying to pay Wells Fargo back in order to repair his own ruined credit rating. That is hardly a humanitarian motive and does not qualify for protection under section 1152. Accordingly, the trial court did not err by admitting evidence of Yousefi's partial repayments.

2. *The Repayment Evidence Did Not Violate Section 352*

Yousefi contends that admission of the repayment evidence should have been excluded under section 352 because its probative value, if any, was outweighed by its prejudicial effect. However, no such objection was made. Instead, defense counsel argued that it should have been excluded for unspecified public policy reasons and because Yousefi's apparent civil liability for Wells Fargo's losses regardless of any criminal responsibility meant the evidence was "not particularly probative for the jury to know" Arguably, the objection was not sufficiently specific and was waived. (§ 353; *People v. Ramos* (1997) 15 Cal.4th 1133, 1171-1172 [relevancy objection not sufficient to invoke section 352].) However, we assume for purpose of our discussion that the reference to "probative" sufficiently presented the issue.

Assuming for discussion's sake only that a proper objection was made and that error occurred, we will not reverse unless a different result was reasonably probable had the disputed evidence been excluded. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 363, 367.) We conclude that a different result was not likely. First, Yousefi admitted to making withdrawals of \$12,000 from Wells Fargo, but pinned the entire scheme on Tehrani, painted himself as a victim of that scheme, and denied all knowledge of the forged check deposits. Even though the repayment evidence was argued to the jury as an admission of Yousefi's criminal responsibility, the evidence was also helpful to his defense because it was entirely consistent with his claim that he was as much a victim of Tehrani as was Wells Fargo and was trying to make good on the mess his misplaced trust had caused. Second, as noted in footnote 4, *ante*, we have examined the surveillance photos of two of the four phony check deposits and, as Yousefi contends, the two different men depicted in those photos do not look like him. In order for the jury to convict Yousefi, it must have determined he was working in concert with others. The prosecution made that argument to the jury, which was instructed it could convict Yousefi as an aider and abettor. Yousefi testified that he believed Tehrani was wiring money into the Wells Fargo account and that he withdrew those funds for Tehrani.

However, he offered no explanation why he needed to make several withdrawals at different dates and times from different branches, a suspicious circumstance that likely led the jury to believe in his guilt. Therefore, even if error occurred, we conclude a different result was not reasonably probable.⁷

3. *Defense Counsel's Failure to Introduce Time Gap
Evidence Was Not Ineffective Assistance of Counsel*

The prosecution introduced evidence that a forged check in the amount of \$3,540 was deposited at 2:54 p.m. on April 26, 2006, at a Wells Fargo ATM on West Pico Boulevard in Los Angeles. As discussed earlier, the prosecution also introduced evidence -- and Yousefi admitted -- that he made an over-the-counter withdrawal of \$1,700 from a Wells Fargo branch on South Crenshaw Boulevard in Inglewood just three minutes later. Yousefi asked us to judicially notice that the distance between these two locations is approximately 12 miles and that it would have been physically impossible for him to have conducted both transactions. We grant that request. (§ 452, subs. (g), (h).) He contends that his trial lawyer's failure to put that time gap evidence before the jury was ineffective assistance of counsel because it would have shown he did not deposit all the forged checks. Because Wells Fargo's records showed that only one ATM card had been issued to Yousefi, he believed the time gap evidence also showed that he was truthful when he claimed he gave Tehrani his ATM card and never got it back and also showed that someone other than him must have made purchases and account balance inquiries with that card.

In order to establish that he received ineffective assistance of counsel, Yousefi must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and, if so, that a different outcome was reasonably probable had defense counsel performed adequately. (*In re Athena P.*

⁷ Because we affirm on this alternative ground, we need not reach Yousefi's contention that his trial lawyer's failure to object under section 352 amounted to ineffective assistance of counsel.

(2002) 103 Cal.App.4th 617, 628.) As just discussed, based on the surveillance photos alone, the jury must have concluded that Yousefi did not act alone. Evidence that someone else must have been involved in the transactions or had access to his ATM card at different times and places would have only served to reinforce that conclusion and we therefore hold that even if his counsel should have introduced the time gap evidence, a different result was not reasonably likely.

DISPOSITION

For the reasons set forth above, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

O'NEILL, J.*

* Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.